No. 83-222

In the Supreme Court of the United States

OCTOBER TERM, 1983

BORMAN'S INC.,
Petitioner,
VS.
ALLIED SUPERMARKETS, INC.,
Respondent
and
CREDITORS' COMMITTEE OF ALLIED SUPERMARKETS, INC.

MOTION TO INTERVENE AS PARTY RESPONDENT, OR ALTERNATIVELY AS AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
AND
BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,
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NOW COMES the Creditors' Committee of Allied Supermarkets, Inc. (the "Committee"), and moves that this Court permit it to intervene in this matter as a party respondent or alternatively as amicus curiae for the purpose of filing a brief in support of the Respondent in opposition to the petition of Borman's Inc. for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and in support thereof says as follows:

1. The Committee herein was duly elected to represent the interest of approximately 10,000 unsecured creditors with claims in excess of $75,000,000.

2. The Committee has been active in the reorganization of the Respondent's business, representing the interests of its constituent members.

3. The Committee, since its inception, has been cognizant of and sensitive to the needs and interests of all of those

affected by this reorganization proceeding and has participated fully as a party in this matter in the bankruptcy court and the district court.

4. The United States Court of Appeals for the Sixth Circuit denied the Committee the right to intervene, but the Committee was granted the right to participate as amicus curiae.

5. The granting of this request for permission to intervene and appear as party respondent or as amicus curiae on behalf of Respondent will aid the successful reorganization of the Respondent which is vitally important to the creditors.

6. The Committee fully supports the position of the Respondent and opposes the Petition for a Writ of Certiorari.

WHEREFORE, the Creditors' Committee respectfully requests that it be granted the status of party respondent or alternatively as amicus curiae for purposes of submitting its Brief in Opposition to the Petition for a Writ of Certiorari.

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Motion Pending to Admit as Intervening Party Respondent or Amicus Curiae

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Creditors' Committee, by its attorneys, Hertzberg, Jacob & Weingarten, P.C., submits its Brief in Opposition to Borman's Inc. Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

1. Should the Supreme Court of the United States grant a Writ of Certiorari where there is neither conflict among the courts nor any legal issue of general application?

2. Should the Supreme Court of the United States grant a Writ of Certiorari where the issues of the case have long since become moot?

PARTIES

The Creditors' Committee adopts the statement of Parties as submitted to the Court in the Petition for a Writ of Certiorari.

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OPINIONS BELOW

The Creditors' Committee adopts the statement of Opinions Below as submitted to the Court in the Petition for a Writ of Certiorari.

JURISDICTION

The Creditors' Committee adopts the statement of Jurisdiction as submitted to the Court in the Petition for a Writ of Certiorari.

STATUTES INVOLVED

The Creditors' Committee adopts the statement of Statutes Involved as submitted to the Court in the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On November 6, 1978 Allied Supermarkets, Inc. (the "Debtor") filed a voluntary petition under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701 et seq. A creditors' committee (the "Committee") was duly elected to represent the interests of approximately 10,000 unsecured creditors with claims in excess of $75,000,000. During the course of the proceedings, the Debtor presented a business plan to the Committee which set forth several actions the Debtor recommended be implemented. Included in the recommended actions were changes in the collective bargaining agreements then in existence between the Debtor and Locals 876, 36 and 539 of the United Food and Commercial Workers International Union (the successor to the merged Retail Clerks International Union and the Amalgamated Meat Cutters and Butcher Workmen of North America) (the "Unions") which were scheduled to expire no later than April 6, 1980.

Recognizing the urgency of the need to renegotiate the collective bargaining agreements between the Debtor and the Unions, the Debtor filed its application to reject the collective bargaining agreements before the bankruptcy court. The Committee supported the rejection, and the Unions chose to remain neutral on the issue of rejection. The bankruptcy judge

granted the application to intervene of two competitors, Chatham Supermarkets, Inc. and Borman's Inc. ("Borman's"). Intensive discovery was conducted during the next four days, followed by two full days of trial.

The bankruptcy judge ruled that the standard to be applied to consideration of rejection of an executory contract was the advantage to the Debtor or the onerous or burdensome effect of the executory contract on the Debtor. He acknowledged that in regard to collective bargaining agreements, the court would also consider and balance the equities in relation to the employees who are members of the collective bargaining unit (37a). He concluded that the weekly losses of $173,000 incurred by the Debtor were attributable in large part to the labor costs (39a-40a), and he found that without rejection of the collective agreements between the Debtor and the Unions, 4,500 jobs would be lost (42a). Although the bankruptcy judge ruled that he was not required to consider the effect of rejection of the collective bargaining agreements on Borman's and Chatham in reaching the conclusion that rejection was necessary, he in fact did consider the competitors (42a-43a). The district court even commented that the bankruptcy judge's opinion suggested the interests of the Debtor's competitors were actually considered by him (29a, footnote 12).

Rejection of the collective bargaining agreements between the Debtor and the Unions was authorized by the bankruptcy court, and Chatham and Borman's appealed that decision to the district court. The Committee, having participated at the trial level, also participated fully in the appeal process at the level of the district court as a party. The Committee filed a brief in opposition to that of Borman's and participated in oral argument. The district court affirmed the ruling of the bankruptcy judge that the interests of the Debtor's competitors were entitled to little or no weight (31a). The district court confirmed that the stricter standard regarding balancing the equities related only to a debtor and its employees not to competitors of a debtor which may be parties to a multiemployer bargaining agreement:

> In such a situation, the Court finds it difficult to conceive of a case in which the equities of the debtor's competitors could ever overcome the interests of the debtor and the debtor's employees. (30a).

The third court to consider these arguments, the United States Court of Appeals for the Sixth Circuit, affirmed the district court judge's ruling:

> We agree with the district court that Borman's interest in Allied's application was insubstantial when compared to the interests of Allied and the unions. Thus, we hold that an employer's interest in holding another employer to the terms of a labor contract negotiated by a multiemployer bargaining unit need not be weighed when passing upon applications to disaffirm executory labor contracts. (footnote omitted). When such objections arise, the general rule which looks only to whether rejection would be advantageous to the debtor is properly applied. (7a-8a).

The court of appeals made note of an interesting result that could have occurred outside of the jurisdiction of the bankruptcy court:

> The insubstantiality of Borman's interests in Allied's applications becomes even more apparent when one considers that Allied always retained a right to withdraw from the multiemployer bargaining unit without the approval of the other employer members. Before the commencement of bargaining an individual member of a multiemployer bargaining unit may withdraw upon timely written notice to the union. See, e.g., *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1958). After the multiemployer bargaining unit has commenced negotiations with a union, an individual employer may still withdraw where the union consents, e.g., *Hotel and Restaurant Employees*, 240 N.L.R.B. 757, 759 (1979), or where the employer faces "unusual circumstances" such as "evident economic hardship." *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558 (1968). **None of these recognized methods of withdrawal requires the approval of the other employer members of the multiemployer association. Here Allied both received the consent of the unions and faced extreme economic hardship. (8a footnote 9).**

After considering the lengthy and well considered opinions of three lower courts, it is also crucially important to note that Borman's never requested in writing from any of the lower courts a stay of the order authorizing rejection of the collective bargaining agreements. Immediately after rejection of the collective bargaining agreements at issue by the bankruptcy judge, new collective bargaining agreements were reached between the Debtor and the Unions. Thereafter, upon expiration of those collective bargaining agreeements, in 1980, new collective bargaining agreements were reached between the Debtor and the Unions which have now also expired by their own terms. As a consequence of the positive financial results achieved by the Debtor following the granting of labor concessions, the Debtor was able to successfully negotiate a plan of reorganization with the Committee which was accepted by a vote of the creditors and confirmed by the bankruptcy court on September 30, 1981. Pursuant to said plan of reorganization, the creditors received cash and stock of the Debtor. While appealing the matter at bar, Borman's also chose to pursue a legal remedy by filing a claim with the bankruptcy court for monetary damages which allegedly resulted from the rejection of the collective bargaining agreements.

REASONS FOR DENYING THE PETITION

1. The Supreme Court of the United States should not grant a Writ of Certiorari where there is neither conflict among the courts nor any legal issue of general application.

In joining in opposition to Borman's Petition for Writ of Certiorari, the Committee believes that the United States Supreme Court, in the exercise of its discretion, should not grant a writ. The Rules of the Supreme Court state that "[A] review on writ of certiorari is not a matter of right but of judicial discretion. . . ." Sup. Ct. R. 17.1 (1980). Among the reasons enumerated justifying granting writs of certiorari, none is present in the instant case. While those factors which are listed in Rule 17 are "[n]either controlling or fully measuring the Court's discretion," the Committee believes that the character of this case does not justify review by the Supreme Court.

It has been stated that general public importance of the issues and the need to secure uniformity of federal law are basic to granting certiorari. 16 *Federal Practice and Procedure*, Section 4004 at 508. The individual peculiar facts of this case, which have consumed the energies and time of the litigants herein and three lower courts, are without broad application to the general public. The decisions of the courts below have fully considered the issues litigated between the parties, and while further argument in this Court may provide yet a fourth forum for Borman's, a decision by this Court is unlikely to have any impact beyond the immediate parties and their privies. This Court should not be utilized by Borman's as merely one more court of appeals.

The limited application of the issues by Borman's is highlighted by the absence of authority on the subject from other courts. Borman's brief is bereft of citations to conflicting authority. Borman's heavily relies upon *N.L.R.B.* v *Bildisco & Bildisco*, 682 F2d 72 (3d Cir 1982), *cert. granted*, 103 SCt 784 (1983), which is easily distinguishable from this case upon the facts. While the rejection of a collective bargaining agreement is common to both cases, in *Bildisco*, the employees objected to the rejection of the collective bargaining agreement. A union objection is much more common and has much greater application than the case at bar. Herein, the Unions have never opposed the rejection of the collective bargaining contracts and Borman's, which is contesting the relief granted, is merely a competitor of the Debtor. Never has it been suggested by any previous opinion that the interests of a competitor should outweigh the interests of a debtor and its employees. Yet, that is what Borman's would have this Court consider. In *Bildisco*, the issue is whether there is a conflict between the N.L.R.A. and the bankruptcy laws and the consideration which must be given to the employee parties to a collective bargaining agreement. In the case at bar, no such issue is present and Borman's has presented the question of whether, as a competitor, its interests should be weighed to prevent the rejection of the Debtor's executory contract.

This case is unique and having been decided by the court of appeals, there is no question within the Sixth Circuit as to the controlling authority. There are no conflicting decisions

from other circuits, as there are no decisions at all on point from other circuits. It has been said that "[t]he rationale for granting certiorari is to achieve a uniform application of federal law in the intermediate federal court system." 13 *Moore's Federal Practice*, Paragraph 817.21.There can be no goal of achieving harmony in the law in the absence of conflicting authority. Because the issues herein are of such minor importance in the overall structure of the law, resolution by the United States Supreme Court is unnecessary.

The reasons justifying the granting of a writ of certiorari that have been present in other cases where the Court did grant the writ are not present in this case: "We granted certiorari to resolve this important constitutional question." *Fitzpatrick* v *Bitzer*, 427 US 445, 448 (1976) (per Rehnquist, J.); "[b]ecause we question the applicability of [a prior decision] to this situation, we granted certiorari . . . ." *Cantor* v *Detroit Edison Co.*, 428 US 579, 581 (1976) (per Stevens, J.); "we granted certiorari to address the important issues raised. . . ." *Nebraska Press Ass'n* v *Stuart*, 427 US 539, 546 (1976) (per Burger, C.J.).

Further, it is well known that the Supreme Court exercises its discretion on the assumption that it cannot function as an ordinary appellate court focusing only on individual cases. As stated by Chief Justice Taft,

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v *Western Well Works, Inc.*, 261 US 387, 392-93 (1923). As to the issues herein, there exists no conflict among the circuits; neither do there exist legal principles of importance to the general public.

2. The Supreme Court of the United States should not grant a Writ of Certiorari where the issues of the case have long since become moot.

An additional and primary consideration must be that the original decision was entered over four years ago and con-

cerned the rejection of labor contracts which have long ago expired by their own terms. As the Court has noted, the Unions which were parties to the rejected contracts, fully cognizant of the beneficial effects of rejection, never opposed that step in the reorganization of the Debtor's business. In fact, the Unions have filed briefs in support of the Debtor's position.

As the years have passed, thousands of individuals and entities have relied upon the decision which was rendered. If at this point, there were reconsideration of the holdings of all of the judges below, it would undermine broad and longstanding reliance to their detriment. Any result other than the fair and just one reached below would cause confusion and chaos in an attempt to "unscramble the eggs."

The subject matter of this dispute is a 1977 collective bargaining agreement which would have expired, upon its own terms, in 1980. Subsequent labor contracts have since been adopted and expired. The subject matter of this dispute is thus moot. This Court has held in a labor dispute setting, for example, that where an arbitration award was superseded by a subsequent agreement and the prescribed one year period had elapsed, the dispute had become moot for lack of subject matter on which the judgment of the Supreme Court could operate. *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of America, Division 998* v *Wisconsin Employment Relations Bd., Wis.*, 340 US 416 (1951).

In this case the rejection of the collective bargaining agreement, as approved by three courts below, is a reality upon which there has been substantial reliance by a great number of persons and entities with diverse interests. The employees themselves, having never opposed rejection, have changed their position in reliance upon the effective rejection of the contract. The 10,000 creditors engaged in lengthy negotiations and compromised claims amounting to over $75,000,000 based on the financial condition of the Debtor after the rejection of the labor contracts. Many creditors on the Committee have continued to supply the Debtor and undertake risks based on the financial condition of the Debtor that is a direct result of the successful rejection and upon their belief in the viability of the enterprise. Additionally, there has been extensive trading in the stock of the Debtor by its shareholders who have

based their transactions upon the Debtor's overall financial status. A substantial change in labor costs at this point would severely and detrimentally affect that financial status, thereby undermining the extensive reliance of so many parties. Additionally, it would be difficult to go back in time, wading through the myriad transactions of these many parties, in order to apply some measure by which to restructure this complex situation. Further, it should be noted that no stay has ever been requested in writing by Borman's, evidencing no effort to prevent what has now become a financial reality. Finally, Borman's has filed in the bankruptcy court a multimillion dollar claim for damages as a result of the rejection of the collective bargaining agreements. Thus, there exists a legal remedy for Borman's if the claim for damages is sustained. That appears to be the appropriate manner in which to finally resolve this dispute between two retailers.

CONCLUSION

The only real questions raised in Borman's petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, Borman's asks this Court to make a fourth review of the record to see if it will hold what three previous courts have been unwilling to hold. Lastly, far too many persons and entities have relied upon the lower court decisions in making major financial decisions with regard to the Debtor.

In light of the Supreme Court Rules governing writs of certiorari and long established practices of this Honorable Court, it is clear that Borman's request should be denied.

Respectfully submitted,
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